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No. 94-1363

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

UNISYS CORPORATION, doing business as REMINGTON RAND UNIVAC, doing business as SPERRY UNIVAC, doing business as SPERRY, doing business as UNISYS, doing business as PARAMAX SYSTEMS,

Petitioner,

vs.

RICHARD ANDERSON; ROBERT EGGAN; CARL ENGLEHORN; NORRIS NIELSEN; TIMOTHY WANDERSEE; DONALD WOODS; PETER LOWRY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner has sought a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals reversing the United States District Court for the District of Minnesota's entry of summary judgment for Petitioner.

Petitioner's phrasing of the two questions Petitioner desires to present is argumentative and inaccurate. Petitioner's two stated questions also contain a subsidiary but very significant third question.

A clear rendition of Petitioner's first question is:

1. Do ambiguous and misleading written representations by the Equal Opportunity Employment Agency ("EEOC") concerning the administrative charge-filing period of the Age Discrimination in Employment Act ("ADEA") to a pro se claimant equitable toll the administrative charge-filing period of the ADEA?

A clear rendition of Petitioner's second question is:

2. Is it an unconstitutional usurpation of federal power to allow ambiguous and misleading written representations by a state agency, the Minnesota Department of Human Rights ("MDHR"), on the federal ADEA administrative charge-filing period to result in the tolling of that charge-filing period, if the representations were made by the MDHR while acting pursuant to its role under Federal Law as an agent for the EEOC, when similar ambiguous and misleading written representations made directly by the EEOC would result in tolling?

Petitioner raises a third question, in the apparent hope that if review is granted, and Petitioner does obtain a reversal on one or both of the two prior questions, Respondents' claims might be entirely dismissed by the Court. This third question is:

> 3. Did the district court properly reach its summary judgment decision holding as a matter of law that Petitioner complied with the ADEA notice provisions?

Respondents have filed an associated cross-petition for a writ of certiorari.

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schedule a hearing on the second summary judgment motion; (6) refusing to reopen discovery in light of Petitioner's surprise evidence; (7) issuing a summary judgment order based on the surprise evidence and despite previously submitted, contradictory evidence that had not been discredited – so drastically and seriously departed from the accepted and usual course of judicial procedure: and the Courts of Appeals' failure to rule on this departure: call for the exercise of the Court's power of supervision. 20

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion on which Petitioner seeks review is the Eighth Circuit Court of Appeals' decision reversing the district court's December 28, 1993 summary judgment order and affirming the

district court's October 20, 1993, order. The decision was issued on February 14, 1995, is reported at 47 F.3d 302 and reprinted in the Appendix to Petitioner's Writ at A, 5-22. The Eighth Circuit on April 19, 1995 denied the non-Anderson/Nielsen Respondents' motion for rehearing. The April 19, 1995 order is unreported and reprinted in the Appendix ("A") to Petitioner's Writ at A, 1-4.

The opinion of the district court holding that there was evidence that Petitioner failed to comply with ADEA notice provisions and allowing the joinder of additional Plaintiffs in this action was issued on March 25, 1993. It is unreported and reprinted in the Appendix ("B") to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari at B, 4a-21a. The opinion of the district court granting Petitioner's motion to dismiss the federal claims of the non-Anderson/Nielsen Respondents and the state claims of all of the Respondents was issued on October 20, 1993. It is unreported and reprinted in the Appendix to Petitioner's Writ at A, 47-60. The opinion of the district court denying Respondents' motion to reconsider the dismissal of the non-Anderson/Nielsen Respondents was issued on November 24, 1993. It is unreported and reprinted in the Appendix ("A") to Respondents' Writ at A, 1a-2a. The district court's denial of Petitioner's first motion for summary judgment is attached in the Appendix to Respondents' Brief in Opposition to a Writ of Certiorari at C, 22a-23a. The district court's opinion granting Petitioner's second motion for summary judgment and holding that there was no evidence that Petitioner had failed to comply with ADEA notice provisions was issued on December 28, 1993. It is unreported and reprinted in the Appendix to Petitioner's Writ at A, 23-46.

The pretrial schedule order of the district court establishing that all discovery shall terminate on October 1, 1993, that all dispositive motions shall be filed and the hearing thereon

completed prior to December 1, 1993, and that all dispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(b), was issued on September 14, 1992. It is reprinted in the Appendix to Respondents' Brief in Opposition to the Petition for a Writ at A, 1a-3a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is appropriate under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 2101(c), the writ must be applied for within ninety days after the entry of judgment or decree. The 90 day period commences from the date of a denial of a petition for rehearing. The non-Anderson/Nielsen Respondents' petition for a rehearing was denied on April 19, 1995. The 90 day period expired on July 19, 1995.

RELEVANT STATUTES, REGULATIONS AND RULES INVOLVED

29 U.S.C. § 626(d):

> No civil action may be commenced by an individual under this section until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed —
>
> * * *
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 627:

> Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act.

29 U.S.C. § 633:

> (a) Nothing in this Act shall effect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant and seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, that such sixty day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such

> proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subjection at the time such statement is sent by registered mail to the appropriate State authority.

29 C.F.R. § 1626.9:

> (a) The Commission may refer all charges to any appropriate State agency and will encourage State agencies to refer charges to the Commission in order to assure that the prerequisites for private law suit, as set out in section 14(b) of the Act, are met. Charges so referred shall be deemed to have been filed with the Commission in accordance with the specifications contained in sec. 1626.7(b). * * *
>
> (b) States to which all ADEA charges may be referred: * * * Minnesota * * *.

29 C.F.R. § 1627.10:

> Every employer, employment agency, and labor organization which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Commission or its

> authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

Minn. Stat. § 363.03 subd. 1:

> * * * it is unfair employment practice . . . For an employer, because of * * * age,
>
> > (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
> >
> > (b) to discharge an employee; or
> >
> > (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Minn. Stat. § 363.06 subd. 3:

> A claim of an unfair discriminatory practice must be brought as a civil action * * * or filed in a charge with the commissioner within one year after the occurrence of the practice. * * *

Fed. R. Civ. P. Rule 56(c):

> The motion shall be served at least 10 days before the time fixed for a hearing.

Local Rules of the United States District Court for the District of Minnesota L.R. 7.1:

> (b) Dispositive Motions:
>
> > (1) No motion shall be heard by a district judge unless the moving party delivers one copy of the following documents to opposing counsel * * * at least 28 days prior to the hearing: * * *
> >
> > (D) Affidavits and Exhibits
> >
> > (E) Memorandum of Law
> >
> > * * *
> >
> > (2) Any party responding to the motion shall deliver one copy of the following documents to opposing counsel * * * at least 9 days prior to the hearing:
> >
> > (A) Memorandum of Law
> >
> > (B) Affidavits and Exhibits.

STATEMENT OF THE CASE

Contained in the two questions Petitioner presents for review is Petitioner's assertion that it has complied with the ADEA's notice provisions and it has committed no misconduct. Respondents request that this subsidiary question, clearly included in Petitioner's two principle questions, be raised with and reviewed by the Court.

In the 18 months from June of 1992, when Petitioner was first served with discovery from Respondents, to December 14, 1993, Petitioner never disclosed any evidence showing that it had posted the required ADEA notice at the facility in which most of the Respondents had worked. Only after the expiration of both the discovery and dispositive motion deadlines and after Petitioner had already lost a summary judgment motion on the ADEA notice issue, did Petitioner produce critical and surprising evidence purporting to show an ADEA posting at Respondents' place of work. The district court permitted Petitioner to make a second summary judgment motion on the same issue, violating the scheduling order previously issued in the action because the dispositive motion deadline had passed. The district court then gave Respondents only 5 days to respond, instead of the 19 days the local practice rules provide to parties responding to summary judgment motions. One week later, without a hearing, on December 28, 1993 the district court entered summary judgment against the Respondents, in spite of long standing and substantial evidence that showed Petitioner had not complied with ADEA notice provisions, some of which had been in the district court's file for one year. These actions by the district court were a drastic and serious departure from the accepted and usual course of judicial proceedings and warrant review.

Respondents oppose Petitioner's request that the question, whether ambiguous and misleading representations by agents of the EEOC toll the charge filing period, be reviewed. Petitioner has made several misstatements on this issue in its Petition. The Minnesota Department of Human Rights' ("MDHR") representations on the ADEA's charge filing deadline to Respondent Anderson were not, as Petitioner claims, "accurate but incomplete." Instead, as the Eighth Circuit states, the representations were "ambiguous and misleading." The MDHR did not tell Respondent Anderson, as Petitioner incorrectly implies in its Statement of the Case, that the Minnesota statute's

charge filing period was one year. Rather, the MDHR did not indicate whether the one year charge filing period disclosed to Respondent Anderson was the state filing period, the federal filing period, or the filing period under both federal and state law. Petitioner's allegation, that the Eighth Circuit's decision to equitably toll the ADEA charge filing period is in direct conflict with the decisions of the other Circuits, is incorrect.

Respondents have filed an associated cross petition for a writ of certiorari.

FACTUAL BACKGROUND

A. Involuntary Terminations

All seven Respondents were employed for many years by Petitioner in its Software Engineering Department. They were all selected for termination at the same management meeting and were not discharged in two distinct layoffs, as Petitioner incorrectly claims. Six were told they were laid off on April 2, 1990. Petitioner delayed informing the seventh Respondent of his discharge, Donald Woods, until June 18, 1990.

Petitioner initially misled Respondents by claiming Respondents were being laid off in a "reduction in force." Evidence uncovered through discovery shows that the number of employees and contract workers in the Software Engineering Department actually increased following this alleged "reduction in force."

B. Administrative Proceedings

Respondent Anderson is the lead Plaintiff in this action. He filed a pro se administrative charge and subsequently commenced this action by filing a pro se Complaint. If his

administrative charge is viable, other Respondents should be able to "piggyback" on his filing. *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986).

In the fall of 1990 Respondent Anderson contacted the Minnesota Department of Human Rights ("MDHR"). The MDHR informed Respondent Anderson, in writing, that if his charge alleged a violation of federal law, it would notify the Equal Employment Opportunity Commission (EEOC) for him. The MDHR is a deferral agency under federal law and has a working relationship with the EEOC.

The MDHR, in writing, also told Respondent Anderson that the charge filing period was one year, without indicating whether this period was for state claims, federal claims, or both. Respondent Anderson did not know that the one year period was for state law claims only, and that the ADEA filing period was shorter and only 300 days. Petitioner's claim, made for the first time in its current petition, that there is no evidence that Respondent Anderson relied on the MDHR's misleading representation, is incorrect.

Supposedly, federal procedures governing administrative charges of discrimination are designed to enable claimants to represent themselves, and that is what Respondent Anderson proceeded to do for the next year. From the time of his layoff in April of 1990 until June of 1992, when Respondent Anderson contacted the below identified Counsel of Record, Respondent Anderson was not represented by an attorney. Petitioner's claim on page 7 of its Petition, that Respondent Anderson consulted with Attorney O'Brien after his administrative charge was dismissed, is false. Petitioner's implication, on page 6 of its Petition, that Respondent Anderson, like the rest of the filing Respondents, consulted with Attorney O'Brien on charge filing procedures, is incorrect. Respondent Anderson was relying on the MDHR's representations on the charge filing period.

As a result, when Respondent Anderson, on March 25, 1991, filed a pro se administrative charge with the MDHR, he thought he was complying with the only applicable filing period. Though Respondent Anderson had filed within the state administrative filing limitations period, Minn. Stat. § 363.06, subd. 3, he had not filed within the federal administrative filing period, 29 U.S.C. § 626(d).

Age discrimination charges were also filed by Respondents Eggan, Englehorn, Lowry, Wandersee and Woods.

Petitioner, in its defense to the administrative charges, repeated the misrepresentation that Respondents were discharged in a "reduction of force". The MDHR subsequently dismissed the claims of the six Respondents who had filed administrative charges.

C. Commencement of the Action

On February 10, 1992, Respondent Anderson filed a pro se Complaint in federal court. Contrary to Petitioner's suggestions, this Complaint did allege that the layoff which included Respondent Anderson disproportionately impacted Petitioner's older workers and that Petitioner had discriminated against him as well as other older workers because of their age.

The pro se Complaint was not immediately served. It was Respondent Anderson's understanding that the commencement date of both his federal and state claims would be the filing date as long as the pro se Complaint was served within 120 days of its filing, in compliance with Federal Rules of Civil Procedure 3 and 4(m). The district court did not share the same understanding and later held that the State Procedural Rule, which provides that an action is commenced only upon service, and not upon filing, determined the commencement time for the state claims. In the

119 days between filing and service, the district court held that the limitations statute on the state law claims had run. As a result, the state law claims of all of the Respondents were dismissed.

Respondent Anderson eventually retained an attorney and, shortly thereafter, filed in June of 1992 an Amended Complaint. The Amended Complaint alleged that the administrative charge had been timely filed. It also specifically stated that Respondent Anderson intended to seek certification for a class action. Both the Amended Complaint and the pro se Complaint were served on Petitioner on June 9, 1992.

It would still be another six months before Respondent Anderson learned that Petitioner would make an issue out of the alleged untimeliness of Respondent Anderson's administrative filing. For example, in its July 10, 1992 Answer to Respondent Anderson's Amended Complaint, Petitioner specifically admitted that Respondent Anderson's administrative charge was timely. Petitioner also failed to assert as a defense in its Statement of the Case 1 1/2 months later a claim that Respondent Anderson's administrative charge was untimely.

D. Motion for Class Certification; Timeliness Issue Raised by Petitioner for the First Time; No Evidence of Posting at Respondent Anderson's Facility

On December 9, 1992, Respondent Anderson moved the court to certify a class consisting of employees of Petitioner's Software Engineering Department who were terminated in 1990. In its response to this motion Petitioner, for the first time, raised as an issue the timeliness of Respondent Anderson's administrative charge. Petitioner claimed that because Respondent Anderson's administrative charge was defective, no additional putative Plaintiffs could piggyback on it.

Respondent Anderson argued that there were several reasons why tolling of the charge filing period was justified. The district court rejected all but one of them, including the argument that tolling was justified because of the misleading statements on the charge filing period by the MDHR.

The district court did find that there was evidence to justify tolling on one basis, however. Respondent Anderson had never seen a proper ADEA notice at the building he had worked at prior to his departure. He did not know when he was discharged that he was old enough to be protected under the age discrimination laws. He filed an affidavit in which he testified that Petitioner had not posted in his building the legally required notice on the ADEA. Prior to this motion, Petitioner had not disclosed any evidence of a posting at Respondent Anderson's facility, nor did Petitioner produce any evidence in connection with this motion contradicting Respondent Anderson's affidavit.

On March 25, 1993, the district court ruled that there was evidence showing that Petitioner had failed to comply with ADEA notice provisions, held that a failure to post would toll the ADEA administrative charge filing period, and concluded that Respondent Anderson had evidence that could establish his charge was timely. The district court denied Respondent Anderson's request for class certification on the grounds that the requested class was not sufficiently numerous, but ruled the additional Respondents could piggyback on Respondent Anderson's claim and join this action. The five Respondents who had filed administrative charges, along with Respondent Nielsen, who had not, joined the action in June of 1993.

E. Motion to Dismiss the Non-Anderson/Nielsen Respondents

On July 28, 1993 Petitioner moved for the dismissal of the

non-Anderson/Nielsen Respondents. The district court granted this motion on October 20, 1993, but did not enter an appealable judgment or order. Petitioner did not move for the dismissal of the ADEA claims of Respondents Anderson and Nielsen at this time.

F. Summary Judgment Motions on the ADEA Posting Issue

When the discovery period expired on October 1, 1993, Petitioner still had not produced any evidence in response to Respondents' discovery indicating there had been an ADEA posting at Respondent Anderson's place of work. Nonetheless, Petitioner made two motions requesting summary judgment on the posting issue anyway.

Petitioner's first motion was formally made on September 28, 1993, only three days before the discovery period expired and without the motion's supporting exhibits and evidence. When the supporting materials were delivered, Petitioner conceded it had no evidence of an ADEA posting at Respondent Anderson's facility. Instead, Petitioner disclosed, for the first time, specific details of an alleged ADEA posting in a human resources office in another building, several miles away, and argued that this posting was legally sufficient. However, Respondent Anderson had visited a human resource office only 8 or 10 times in his 25 years with Petitioner. In response to this motion, Respondents also submitted additional material confirming Respondent Anderson's affidavit, submitted 11 months earlier, that there had not been an ADEA posting at Respondent Anderson's place of work. The district court denied Petitioner's first summary judgment motion on December 1, 1993. The same day the dispositive motion deadline expired.

On December 14, 1993, well after both the discovery and dispositive motion deadlines had expired, Petitioner made a second summary judgment motion on the identical issue.

Petitioner was now claiming there was an ADEA posting at Respondent Anderson's building. The affidavits of four previously undisclosed witnesses were submitted in support. In nearly identical language, all four witnesses expressed absolute certainty that there had been a proper ADEA posting at Respondent Anderson's facility. They had been guards who had worked only 1 out of every 7 or so weeks at Respondent Anderson's building over three years earlier.

Even though the local rules of the district court require that summary judgment motions had to be served upon an opposing party 28 days in advance of a hearing, and that the opposing party had up to 9 days prior to the hearing to respond, on December 15, 1993, the district court orally ordered Respondents to reply within 5 days. On December 28, 1993, without a hearing, the district court granted a summary judgment against all of the Respondents. In an order dated January 7, 1994, the district court denied Respondents' motion to reconsider.

The Respondents timely appealed the district court's judgment to the Eighth Circuit Court of Appeals.

Essentially, three general issues were raised in the appeal — whether Respondent Anderson's administrative filing was timely; whether Respondent Anderson commenced the action before the litigation limitations period on the state claims had lapsed; and whether the non-Anderson/Nielsen Respondents could piggyback their ADEA claims onto the ADEA claims of Respondent Anderson. The first of these three general issues is addressed in this brief. The last of these three general issues is addressed in Respondents' Cross Petition for a Writ of Certiorari.

In its February 14, 1995, decision, the Eighth Court of Appeals partially reversed the district court and restored the ADEA claims of two of the Respondents, Richard Anderson and

Norris Nielsen. The Court of Appeals held that the MDHR's representations on the administrative charge filing period had misled Respondent Anderson, that the 300 day ADEA filing period was tolled, and that Respondent Anderson's administrative charge was timely. The Respondents had argued to the Court of Appeals that tolling of the ADEA charge filing period was justified on other grounds as well, including Petitioner's failure to comply with ADEA notice provisions, and that Respondent Anderson's charge was timely under the continuing violation doctrine, but the Court of Appeals concluded it did not have to address these other arguments, given that it had already found Anderson's charge was timely.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT'S DECISION, THAT AMBIGUOUS AND MISLEADING WRITTEN REPRESENTATIONS BY THE EEOC TO A PRO SE CLAIMANT TOLL THE ADEA ADMINISTRATIVE CHARGE FILING PERIOD, IS CONSISTENT AND NOT IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS; THERE IS NO COMPELLING NEED TO REVIEW THIS ISSUE.

Petitioner asks that this question be reviewed to resolve an alleged difference on the issue among the Circuits. A review of this issue, however, is not justified on these grounds.

Simply put, Petitioner's alleged conflict among the Circuits does not exist. Petitioner incorrectly creates the appearance of a conflict by mischaracterizing the Minnesota Department of Human Rights' representations to Respondent Anderson.

The Eighth Circuit correctly characterized the MDHR's language as "ambiguous and misleading" in its opinion A-15. Petitioner's assertion that the communication was "accurate but incomplete" ignores the Eighth Circuit's actual holding and allows Petitioner to compare apples with oranges in its case law analysis.

For example, contrary to Petitioner's claim, there is no conflict between the Tenth Circuit and the Eighth Circuit on this issue. The Tenth Circuit has also adopted the principle that "ambiguous and misleading" written statements by the EEOC justify tolling if they were made to an unrepresented claimant. *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984). That Martinez continues to be good law in the Tenth Circuit was confirmed in *Scheerer v. Rose State College*, 950 F. 2d 661, 665 (10th Cir. 1991).

In *Long v. Frank*, 22 F.3d 54 (2d Cir. 1994) the statement in question was uncertain – ***but it was not misleading*** because the EEOC's uncertainty stemmed from inconsistent case law. The EEOC was informing, accurately, the claimant in *Long* that the law was uncertain, and capitalized the word "may" to emphasize that uncertainty.

The holding in *Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir. 1992) does not conflict with the Eighth Circuit's decision for another reason — the communication in question was oral and not in writing. The Court in *Conaway* made it clear that the oral nature of the alleged communication was the significant factor in the outcome.

> The EEOC undoubtedly engages in numerous telephone calls every day. It would be virtually impossible for the EEOC or a defendant to rebut a plaintiff's unsupported

> allegation that the EEOC provided incomplete information in a telephone conversation. Allowing a plaintiff equitably to toll a time limitation based on incomplete information provided in a telephone conversation would create a great potential for abuse.

955 F.2d at 363.

Finally, in *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748 (3rd Cir. 1983) the key fact was that the allegedly misled claimant had retained an attorney.

II.

APPLYING THE SAME EQUITABLE TOLLING PRINCIPLES THAT APPLY TO THE EEOC TO STATE HUMAN RIGHTS AGENCIES THAT ARE LEGALLY AUTHORIZED AGENTS OF THE EEOC DOES NOT RAISE THE CONSTITUTIONAL ISSUE OF STATE USURPATION OF FEDERAL POWER.

Petitioner argues that the Eighth Circuit's decision allows State officials to "alter" federal statutes of limitations and unconstitutionally usurp federal power.

There is no constitutional issue here. Petitioner is ignoring the fact that any ability the MDHR has to "alter" (in reality toll) the ADEA statute of limitations, if it misleads claimants on the limitations period, is only a result of power and responsibilities that have been freely and gladly delegated to it by the Federal Government. No usurpation has taken place.

Federal law encourages states to adopt and enforce age

discrimination laws, and tries to delegate to the states the EEOC's role of promoting fair employment practices. States that do so are called "deferral states." 29 U.S.C. § 633. In deferral states, ADEA claimants must invoke state proceedings if they wish to preserve their federal claims. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979).

Minnesota is an ADEA deferral state. 29 C.F.R. § 1626.9. When Respondent Anderson's administrative charge was being investigated, the MDHR was in effect acting as the EEOC's representative.

III.

THE DISTRICT COURT'S RULINGS – (1) ALLOWING PETITIONER TO WITHDRAW ITS PRIOR ADMISSION THAT RESPONDENT ANDERSON'S CHARGE WAS TIMELY; (2) GRANTING PETITIONER'S REQUEST TO MAKE A SECOND SUMMARY JUDGMENT MOTION ON PETITIONER'S COMPLIANCE WITH ADEA NOTICE PROVISIONS AFTER THE DISPOSITIVE MOTION DEADLINE HAD EXPIRED; (3) PERMITTING PETITIONER TO USE SURPRISE EVIDENCE TO SUPPORT ITS SUMMARY JUDGMENT MOTION, THAT HAD NOT BEEN DISCLOSED TO RESPONDENTS PRIOR TO THE EXPIRATION OF THE DISCOVERY DEADLINE; (4) ORDERING RESPONDENTS TO RESPOND IN 5 DAYS TO PETITIONER'S SUMMARY JUDGMENT MOTION INSTEAD OF THE 19 DAYS AS REQUIRED UNDER THE LOCAL PRACTICE RULES; (5) FAILING TO SCHEDULE A HEARING ON THE SECOND SUMMARY JUDGMENT MOTION; (6) REFUSING TO REOPEN DISCOVERY IN LIGHT OF PETITIONER'S SURPRISE EVIDENCE; (7) ISSUING A SUMMARY JUDGMENT ORDER BASED ON THE SURPRISE EVIDENCE AND DESPITE PREVIOUSLY SUBMITTED, CONTRADICTORY EVIDENCE THAT HAD NOT BEEN DISCREDITED — SO DRASTICALLY AND SERIOUSLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE: AND THE COURT OF APPEALS' FAILURE TO RULE ON THIS DEPARTURE: CALL FOR THE EXERCISE OF THE COURT'S POWER OF SUPERVISION.

Both in the questions Petitioner contends this case presents, and in its arguments supporting its request for a review of these questions, Petitioner claims it complied with the ADEA's notice provisions. The district court granted Petitioner's second

summary judgment motion on this issue, but it was based on suspicious evidence and the circumstances leading up to the order are disturbing. The circumstances of and the evidence relied upon by the district court were brought to the attention of the Eighth Circuit, but the Eighth Circuit did not address this issue.

29 U.S.C § 627 requires employers to post and keep posted in conspicuous places upon their premises an ADEA notice prepared or approved by the EEOC. 29 C.F.R. § 1627.10 adds that the notice must be posted in "*prominent* and *accessible* place*s* where it can be *readily* observed by employees (and) *applicants* for employment * * *." (emphasis added).

Well established law in all of the circuits holds, and Petitioner does not contest, that an employer's failure to post the required notice can toll the administrative charge filing period. *DeBrunner v. Midway Equipment Co.*, 803 F.2d 950 (8th Cir. 1986).

Petitioner's previous and numerous interrogatory answers, signed under oath, gave absolutely no indication there was a posting at Respondents' place of work. The surprising testimony from the 4 guards contradicted these prior discovery responses. Their affidavit testimony, submitted in a summary judgment proceeding and contrary to Petitioner's earlier sworn discovery responses, should have been ignored by the district court. *Camfield Tires, Inc. v. Michelin Tire Company*, 719 F.2d 1361 (8th Cir. 1983); *Van T. Junkins and Associates Inc. v. U.S. Industries, Inc.*, 736 F.2d 656 (11th Cir. 1984).

Even on July 28, 1993, when Petitioner moved for a bifurcated hearing on the ADEA posting issue, Petitioner submitted no evidence indicating that it had posted an ADEA notice at Respondent Anderson's place of work.

Serious procedural irregularities proceeded the summary judgment order.

The district court violated a prior court order by permitting Petitioner to make its December 14, 1993 summary judgment motion and by allowing the surprising evidence to be submitted. A September 14, 1992 order establishing the pretrial schedule stated that discovery would terminate on October 1, 1993. The same order also held that all motions for summary judgment had to be made *and* heard on or before December 1, 1993.

The district court did not display a similar procedural indulgence towards Respondents. The day after Petitioner made its motion, Respondents received a verbal order from the district court to respond within five days. Respondents were entitled to 19 days under the local rules. Local Rules for United States District Court for the District of Minnesota, Rule 7.1(b). Additionally, Respondents' request that the discovery period be reopened, because of Petitioner's new evidence, was denied.

Serious departures from substantive fairness also occurred.

Summary judgment is not appropriate if there is a genuine factual conflict. *AgriStor Leasing v. Farrow*, 826 F.2d 732 (8th Cir. 1987).

The district court had in the past acknowledged the existence of evidence contradicting Petitioner's. On two occasions before its December 28, 1993 summary judgment order holding that Respondents had no evidence contesting Petitioner's new and surprising evidence, the district court had specifically ruled there was evidence that Petitioner had failed to post. The first time was in its March 25, 1993 order allowing the joinder of additional Plaintiffs. In its December 1, 1993, denial of Petitioner's first request for summary judgment, the district court explicitly held that there was evidence that Petitioner failed to comply with ADEA notice provisions.

Moreover, there was absolutely no indication that Respondent's evidence had suddenly and massively been discredited. Respondent Anderson had consistently, over a period close to one year, testified that he had regularly looked at the bulletin boards in his place of work, that he never saw a posting in conformance with the ADEA *and* that such notice was *not* posted. (His second affidavit was dated December 31, 1992; his third affidavit was dated August 11, 1993; his deposition was taken on August 12 and 13 of 1993; and his fourth affidavit was dated November 22, 1993). Current employees of Petitioner also confirmed there was not a conspicuous and prominent ADEA posting at the complex where most of the Respondents had worked.

CONCLUSION

Due to serious and drastic departures from the accepted and usual course of judicial procedure, and the Eighth Circuit Court of Appeals' failure to address these significant departures, Respondents request that the district court's treatment of the issue of whether Petitioner complied with ADEA notice provisions be reviewed.

Respectfully submitted,

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APPENDIX A — PRETRIAL SCHEDULE OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA FOURTH DIVISION DATED SEPTEMBER 14, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-92-138

Richard Anderson,

Plaintiff,

v.

Unisys Corporation,

Defendant.

PRETRIAL SCHEDULE

DOUGLAS P. KEMPF, Esq., KEMPF & KEMPF, for plaintiff.

THOMAS M. SIPKINS, Esq., POPHAM, HAIK, SCHNOBRICH & KAUFMAN, for defendant.

Pursuant to Rule 16, Federal Rules of Civil Procedure, and in order to secure the just, speedy, and inexpensive determination of this action, the following schedule shall govern these proceedings. The schedule may be modified only upon formal motion and a showing of good cause as required by Local Rule 16.3.

1. The period during which the parties may conduct

discovery shall terminate on October 1, 1993. Disputes with regard to discovery shall be called immediately to the court's attention by the making of an appropriate motion, and shall not be relied upon by any party as a justification for not adhering to this pretrial schedule;

2. All motions which seek to amend the pleadings or add parties, including a class certification motion, must be filed and heard on or before February 1, 1993;

3. All other nondispositive motions, specifically those which relate to discovery and the discovery period, shall be filed and served prior to October 1, 1993. All nondispositive motions shall be scheduled for hearing by calling Cathy Orlando, calendar clerk for the undersigned magistrate judge. All nondispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(a). A total of 15 minutes will be allotted to each party who appears to present argument on the motion. The moving party may reserve up to five of the 15 minutes for rebuttal. No discovery motion shall be heard unless the moving party files with the motion the statement required by Local Rule 37.1 and complies with the requirements of Local Rule 37.2;

4. That within the foregoing period allotted for discovery, but no later than July 1, 1993, plaintiff shall retain and disclose to opposing counsel all persons he intends to call as expert witnesses at trial. The disclosure shall identify each expert and state the subject matter on which the expert is expected to testify. If interrogatories have been served which seek the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, plaintiff's answers to such interrogatories shall be fully supplemented and served on or before July 1, 1993;

Appendix A

5. That within the foregoing period allotted for discovery, but no later than August 1, 1993, defendant shall retain and disclose to opposing counsel all persons it intends to call as expert witnesses at trial. The disclosure shall identify each expert and state the subject matter on which the expert is expected to testify. If interrogatories have been served which seek the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, defendant's answers to such interrogatories shall be fully supplemented and served on or before August 1, 1993;

6. All dispositive motions shall be filed and the hearing thereon completed prior to December 1, 1993. All dispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(b). Counsel should be forewarned that six to eight weeks advance notice is necessary to place a motion on Judge MacLaughlin's dispositive motion calendar;

7. This case shall be considered ready for trial on and after February 1, 1994.

DATED: Sept. 14, 1992.

s/ Franklin L. Noel
FRANKLIN L. NOEL
United States Magistrate Judge

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA FOURTH DIVISION FILED MARCH 25, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-92-138

Richard Anderson,

Plaintiff,

v.

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys, d/b/a Paramax Systems,

Defendant.

MEMORANDUM AND ORDER

Douglas P. Kempf, Kempf & Kempf, 205 Dupont Center, 9801 Dupont Avenue South, Bloomington, MN 55431, for plaintiff.

William R. Skallerud, Thomas M. Sipkins, Popham, Haik, Schnobrich & Kaufman, 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on plaintiff's motion for class certification in this action for age discrimination. Plaintiff's motion will be denied.

Appendix B

FACTS

Plaintiff Richard Anderson had been continuously employed by defendant Unisys Corporation and its predecessor companies from 1965 to 1990.[1] Plaintiff began in 1965 as a staff mathematician. On April 2, 1990, as part of a reduction in force, plaintiff was involuntarily laid off by the Software Engineering Department, a division of Unisys. At the time of his layoff plaintiff was forty-nine years old and held the title of Staff Consultant Development Engineer.

The circumstances surrounding the reduction in force are in dispute. Defendant admits that in late 1989 defendant's senior management instructed the Director of Software Engineering, Donna Kaspersen, to prepare for layoffs within her division. Def.'s Mem. Opp. Mot. Class Cert. at 3. Kaspersen directed the managers she supervised to prepare a ranking of employees based on skill level and the continued need for the job position. Kaspersen held a meeting of her managers on February 7, 1990 to review the rankings. Through discovery, plaintiff obtained handwritten notes that were taken at that meeting and which show stars or checks next to the names of all employees eventually laid off. Affidavit of Douglas P. Kempf Exh. 19. When the layoffs took place on April 2, 1990, fourteen employees within the Software Engineering Division were affected. Kempf Aff. Exh. 1. Twelve out of fourteen were over age forty. *Id.*[2] Plaintiff alleges

1. Unisys was formed by the merger of Burroughs Corporation and Sperry Corporation in 1986. Plaintiff had been employed by Sperry before the merger. Compl. ¶ 20.

2. Plaintiff claims that fifteen persons were laid off and thirteen of those people were more than forty years old. However, the evidence submitted by plaintiff shows only fourteen layoffs, twelve of which affected people over forty. Kempf Aff. Exh. 1.

that the notes from the February 7 meeting make clear that defendant expected the involuntary layoffs to have a disproportionate impact on older employees. Defendant states that in designating certain employees as layoff candidates no consideration was given to the employee's age and every effort was made to place the employees within other divisions of Unisys.

Plaintiff did not file an administrative claim within 300 days of his layoff, as required by the Age Discrimination in Employment Act (ADEA). Plaintiff contends that defendant never posted notice, as required by law, of rights protected by the ADEA. Plaintiff states that if such notice had been posted he would have seen it because after the layoff he regularly checked defendant's employee bulletin boards, at defendant's encouragement, in search for new position within the company. Second Affidavit of Richard Anderson ¶ 3. Plaintiff claims that because defendant did not post notice of his rights under the ADEA, he had only a general awareness of age discrimination laws. *Id.* ¶ 2. More specifically, plaintiff claims that he thought age discrimination laws only protected workers over fifty years old and, because he was forty-nine at the time of his layoff, he assumed he was not covered. *Id.*

Plaintiff asserts that he first became aware that defendant may have violated the ADEA during a conversation with Stephen Cooper of the Minnesota Department of Human Rights in the fall of 1990. *Id.* ¶ 5. In response to his conversation with Cooper, plaintiff requested information from the Human Rights Department. *Id.* The information provided by the department stated that "[y]ou have one year from the date of the action complained of to file a discrimination charge." *Id.* Exh. Plaintiff eventually filed a charge of age discrimination with the

Appendix B

Minnesota Department of Human Rights on March 25, 1991, which was within one year of his layoff. On September 25, 1991, the Minnesota Department of Human Rights dismissed the charges after concluding that the evidence was insufficient to indicate that defendant had a pattern and practice of terminating older employees in numbers disproportionate to their representation in the work force. Affidavit of Richard Anderson Exh. 7. On December 26, 1991, plaintiff formally requested that the department reconsider its conclusions, but the department refused.

Plaintiff filed a complaint, pro se, in federal district court on February 10, 1992 alleging age discrimination in violation of both federal and state law. Apparently plaintiff obtained legal representation after February 10, 1992, but before June 9, 1992, when plaintiff filed a amended complaint in which plaintiff claimed to represent a class of similarly-situated employees.

As evidence of discrimination, plaintiff offers the Court a detailed statistical analysis which he prepared, utilizing his skills as a mathematician, for the purposes of this motion. Plaintiff prepared the statistical analysis based on information obtained during discovery. The data offered by plaintiff includes fourteen pages of graphs and charts, and purports to establish that the probabilities are slim that the lay-offs were not related to age. More specifically, plaintiff claims that his statistical analysis establishes that the percentage of older workers laid off from his department, Software Engineering, were much greater than in any other department within the company.

Plaintiff also alleges that the layoffs in the Software Engineering Division did not comply with defendant's layoff policy. That policy states that part-time, temporary, and

subcontract employees should be laid off first. Kempf Aff. Exh. 20. If management choose to layoff a full-time employee before a part-time, temporary, or subcontract employee, management was required to provide written reasons for that choice. *Id.* Plaintiff alleges that only one out of four part-time employees were laid off, and no subcontractors were terminated. Plaintiff claims that defendant invented reasons for laying off particular full-time employees after the February 7, 1990 meeting, where plaintiff claims defendant decided who would be let go. Plaintiff also alleges that once an older employee was considered a candidate for layoff, supervisors were pressured to lower any subsequent performance ratings for that employee, thereby providing a justification for the layoff decision. *See* Kempf Aff. Exh. 27, 28.

Finally, plaintiff claims that defendant provided the Minnesota Department of Human Rights with misleading information which was relied upon in dismissing plaintiff's charge. Plaintiff alleges that the data supplied was misleading because it covered persons who left voluntarily as well as those who were forced to leave, included both exempt and non-exempt employees,[3] included several departments, and listed certain employees who had been laid off as still active. Plaintiff alleges that by providing misleading information defendant successfully obscured the nature of the lay-offs which occurred in the Software Engineering Division in April 1990.

Plaintiff requests that the Court certify a class action so that thirteen additional plaintiffs may join this lawsuit. Eleven of the thirteen were laid off at the same time as plaintiff. In regard to the other two potential plaintiffs, one was apparently laid off in June 1990, Kempf Aff. Exh. 30; Def.'s Mem. Opp. Mot. Class Cert. at

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3. As defined by the Fair Labor Standards Act.

5, and the other voluntarily left because he was allegedly given trivial work, his supervisory duties were taken away, and was moved to a smaller office. Kempf Aff. ¶ 36.

DISCUSSION

Plaintiff requests that the Court certify a class action for alleged violations of the ADEA. Three issues must be resolved. First, the Court must decide whether plaintiffs are procedurally barred from bringing a class action. Second, if plaintiffs are not procedurally barred, the Court needs to determine whether the putative plaintiffs are "similarly situated." Third, if the Court resolves these issues in plaintiff's favor, the Court must decide what type of notice to putative class members is appropriate.

I. *Timeliness of Administrative Filing*

Summary judgment is appropriate when a plaintiff fails to file an ADEA claim in a timely manner. *Kraemer v. University of Minnesota*, 752 F.Supp. 283, 285 (D.Minn.), *aff'd without opinion*, 915 F.2d 1579 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 680 (1991). "Persons seeking relief under the ADEA in states with laws prohibiting age discrimination in employment are required to file an administrative charge of discrimination with the proper state agency within three hundred days of the alleged unlawful practice as a prerequisite to bringing a civil action." *Kloos v. Carter-Day Co.*, 799 F.2d 397, 399 (8th Cir. 1986); *see also* 29 U.S.C. § 626(d)(2).[4] The administrative filing requirement serves two purposes. First, it gives the state agency an opportunity to eliminate unlawful practices through informal

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4. States with age discrimination laws are deemed "referral states." *Kloos*, 799 F.2d at 399. Minnesota is a referral state. *Id.*; 29 C.F.R. § 1626.9.

conciliation. *Ulvin v. Northwestern Nat. Life Ins. Co.*, 943 F.2d 862, 865 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 970 (1992). Second, it provides employers with formal notice of the charges being brought against them. *Id.* The party may commence a civil action sixty days after the administrative filing. 29 U.S.C. § 626(d).

A failure to comply with the 300-day filing requirement is not necessarily fatal. The 300-day period may be equitably tolled "when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands." *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 676 (1991). In other words, the Court should find that the 300-day period tolled if defendant engaged in some "positive misconduct" which prevented plaintiff from making a timely charge. *Id.* "Positive misconduct" includes concealment, misrepresentation, or failure to post a notice of rights as required by the ADEA. *Nielson v. Western Electric Co., Inc.*, 603 F.2d 741, 743 (8th Cir. 1979).

Defendant asserts that plaintiff's administrative charge was not timely because it was filed on March 25, 1991, more than 300 days after April 2, 1990, the date of plaintiff's termination. In addition, defendant argues that plaintiff has no legally cognizable excuse for missing the 300-day time limit. Defendant asserts that this fact disposes of the entire case.

Plaintiff admits that his administrative filing was not timely under the ADEA. Plaintiff argues, however, that the Court should find that the filing period was tolled for several reasons. First and most important, plaintiff argues that defendant did not provide plaintiff with adequate notice of his rights under the ADEA. Plaintiff assert that at the time of his layoff he had an incomplete understanding of the ADEA. More specifically, plaintiff contends

that he thought the ADEA only protected workers over fifty and he was forty-nine at the time of the layoff. Anderson Aff. ¶ 2. Second, plaintiff asserts that he contacted the Minnesota Department of Human Rights immediately after Stephen Cooper of that department advised him to file an administrative charge and that the documents the Human Rights Department sent to him informed him that he had one year under state law to file a charge, but made no reference to the 300-day deadline imposed by the ADEA. *Id.* ¶ 5-6. Plaintiff contends that the fact that no other employee filed an administrative charge within the 300-day period indicates that no one was adequately informed of their rights under the ADEA. Finally, plaintiff asserts that a finding that the 300-day period was tolled would not prejudice defendant. Defendant does not respond to each of plaintiff's arguments specifically, although defendant does claim that it posted notices of rights under anti-discrimination laws. Def.'s Answers to Pl.'s Interrogatories at 7.

The only legally adequate justification offered by plaintiff for equitable tolling is failure to provide adequate notice. While the information provided by the Minnesota Department of Human Rights may have misled plaintiff and caused him to believe that under the ADEA he had a full year to file his administrative charge, equitable tolling is only appropriate if the failure to file a timely charge is attributable to conduct of the defendant. *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 676 (1991). In regard to the notice of rights issue, based on the evidence provided to the Court to date, a genuine issue of material fact exists whether defendant posted statutorily-required notice. If defendant failed to post notice, the 300-day period was tolled until plaintiff acquired actual knowledge of his right not to be discriminated against on the basis of age. *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950,

952 (8th Cir. 1986). In the absence of posted notice, defendant bears the burden of proving that plaintiff was aware of his rights. *Id.* Plaintiff has offered evidence that he did not become aware of his rights until sometime in the fall of 1990 when he spoke with Stephen Cooper of the Minnesota Department of Human Rights. Second Anderson Aff. ¶ 5. If true, plaintiff filed his administrative claim within 300 days of obtaining actual knowledge of his rights.[5] In short, whether defendant posted notice and whether plaintiff was generally aware of his rights are disputed issues that, on this motion, are construed in plaintiff's favor. *Kyllo v. Farmers Co-Op Co. of Wanamingo Minnesota*, 723 F.Supp. 1332, 1336 (D.Minn. 1989). Thus, for the purposes of this motion, the Court assumes that plaintiff's administrative charge was timely.

If the statute of limitations was tolled, the next issue is whether the putative plaintiffs can piggy-back" their untimely claims to plaintiff's timely claim. The United States Courts of Appeals are split on whether every member of the class must meet the 300-day administrative filing deadline. The rule in the Eighth Circuit is that putative plaintiffs need not personally comply with the filing requirement if one plaintiff in the action has properly filed an administrative charge. *Kloos*, 799 F.2d at 400. *Accord Mistretta v. Sandia Corporation*, 639 F.2d 588, 593-94 (10th Cir. 1980); *Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979). *Contra McCorstin v. United States Steel Corp.*, 621 F.2d 749, 755 (5th Cir. 1980). However, the Eighth Circuit has limited the ability of putative plaintiffs to "piggy-back" their claims on a timely administrative charge of another plaintiff. Because of the purposes behind the administrative filing

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5. Plaintiff filed his administrative complaint on March 25, 1991, which was within 300 days of any date in the fall of 1990.

requirement, namely informal conciliation and a notice of charges, other plaintiffs cannot raise claims that are far beyond the scope of the timely administrative charge. *Ulvin v. Northwestern Nat. Life Ins. Co.*, 943 F.2d 862, 865 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 970 (1992). In short, if plaintiff's claim is shown to have been timely, the putative plaintiffs may "piggy-back" claims that arise out of the same general conduct complained about in plaintiff's administrative charge.

II. *"Similarly Situated"*

Section 216 of the ADEA authorizes class actions to be brought on behalf of "other employees similarly situated." 29 U.S.C. § 216(b); *see also* 29 U.S.C. § 626(b). To satisfy the "similarly situated" requirement plaintiff need not show that his claims are identical to putative class members, only similar. *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613, 616 (S.D.Tex. 1979). "In general, however, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J.), *aff'd*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 110 S.Ct. 482 (1989).

Section 216 alters the general rule for the binding nature of class action judgments. Under Federal Rule of Civil Procedure 23, putative plaintiffs must opt-out of the class or they will be bound by the judgment. Fed.R.Civ.P. 23. Section 216(b), however, provides for the opposite procedure: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Thus, the opt-out procedure of Rule 23 is wholly

inapplicable to ADEA cases. *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986).

Plaintiff argues that the Court should certify this lawsuit as a class action because the putative plaintiffs are "similarly situated." Plaintiff asserts that all putative plaintiffs are similarly situated because they were all over forty years old in 1990, all were professional exempt employees within the Software Engineering Division, a decision to layoff all but one putative plaintiff was reached at the February 7, 1990 meeting, and all were long-time employees of defendant. In regard to the lone proposed plaintiff who was not laid off, James Schaenzer, plaintiff claims that defendant purposely induced him to quit by curtailing his authority and responsibilities. Finally, plaintiff claims that all proposed plaintiffs are similarly situated because they have been affected by the same pattern of conduct.

Defendant does not directly challenge plaintiff's assertion that the other putative plaintiffs are similarly situated as defined by section 216. Instead, defendant offers three general arguments in opposition to certification. First, defendant argues that the Supreme Court's decision in *Sperling* impliedly imposed Rule 23's limits on the Court's authority to certify the class. Rule 23 allows a class action only if joinder is impracticable, there are questions common to the class, the claims of the representative is typical of the class, and the representative will adequately represent the class. Defendant asserts that joinder is not impracticable because there are only thirteen putative plaintiffs, and that he is not an adequate representative of the class because the statute of limitations for court filings (as opposed to administrative filings) bars his claim. Second, defendant argues that allegations alone are not sufficient to justify certification. In support of this argument, defendant again asserts that the

administrative filings were untimely and that the Court should dispose of the case on that basis. Finally, defendant objects to the inclusion of Schaenzer in the class. Schaenzer voluntarily resigned but plaintiff claims that Schaenzer did so because defendant was attempting to force him out by reducing his authority and responsibilities. Defendant argues that Schaenzer is not similarly situated and should not be included in the class. Defendant further asserts that the allegations regarding Schaenzer are hearsay because they are presented in an affidavit of plaintiff's counsel and not by way of an affidavit from Schaenzer.[6]

The Court does not agree with defendant's assertion that the Supreme Court's ruling in *Hoffmann-La Roche Inc. v. Sperling*, 110 S.Ct. 482 (1989), impliedly imposed the requirements of Rule 23 on ADEA class actions.

In *Sperling*, the Supreme Court held that district courts have discretion to facilitate notice in an ADEA class action. This holding is discussed more fully *infra*. In reaching its holding, however, the Court stated that district courts have "the requisite

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6. Plaintiff asks the Court to include Schaenzer in the class based on the following allegations in plaintiff's attorney's affidavit:

> On June 6, 1992 while investigating Plaintiff's claim, I talked to Jim Schaenzer. He told me that in 1990 he was assigned increasingly trivial work, had his supervisory duties taken away, and was given a very small office. He felt he was being targeted and therefore quitting [sic].

Kempf Aff. ¶ 36.

procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, *and not otherwise contrary to statutory commands or the Provisions of the Federal Rules of Civil Procedure.*" 110 S.Ct. at 486 (emphasis added). At least one court has concluded that through this passage the Supreme Court impliedly imposed the requirements of Rule 23 on section 216 class actions. That court reached its conclusion based on the following reasoning:

> I cannot accept the extraordinary assertion that an aggrieved party can file a complaint, claiming to represent a class whose preliminary scope is defined by him, and by that act alone obtain a court order which conditionally determines the parameters of the potential class and requires discovery concerning the members of that class. Before I conditionally determine the scope of the class, plaintiffs will need to satisfy me that there exists a definable, manageable class and that they are proper representatives of the class. They will, in other words, need to show that they satisfy the requirements of rule 23 or convince me that a particular requirement is inconsistent with 29 U.S.C.A. § 216(b).

Shushan v. Univ. of Colorado at Boulder, 132 F.R.D. 263, 268 (D.Colo. 1990).

The Court will not adopt *Shushan's* interpretation of *Sperling* for three reasons. First, the *Shushan* court appears to be the only court in the country to conclude that *Sperling* impliedly imposed the requirements of Rule 23 on ADEA actions. *See, e.g.,*

Anson v. Univ. of Texas Health Science Center, 962 F.2d 539, 540 (5th Cir. 1992); *Church v. Consolidated Freightways. Inc.,* 137 F.R.D. 294 (N.D.Cal. 1991) (discussing *Shushan* at length but rejecting its holding). Second, in an order issued after the *Sperling* decision, another court in this district has stated that "ADEA class actions are not governed by Federal Rule of Civil Procedure 23." *Severtson v. Phillips Beverage Co.,* 137 F.R.D. 264, 265 (D.Minn. 1991), While it appears that the *Severtson* court was not presented with the specific argument offered by defendant, the case is strong persuasive authority that the rule in this circuit continues to be that Rule 23 does not apply to section 216 actions despite the *Sperling* decision. *See Schmidt v. Fuller Brush Co.,* 527 F.2d 532, 536 (8th Cir. 1975). Third, the district court in *Sperling* specifically held that "it is clear that the maintenance of ADEA representative claims . . . is governed by § 216(b) and not Rule 23." *Sperling v. Hoffmann-La Roche. Inc.,* 118 F.R.D. 392, 399 (D.N.J), *aff'd,* 862 F.2d 439 (3d Cir 1988), *aff'd,* 110 S.Ct. 482 (1989). The Supreme Court did not expressly challenge the district court's assertion. Thus, the Court finds that the general statement by the Supreme Court that district courts have "the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure," 110 S.Ct. at 486, should not be read to incorporate the procedures of Rule 23 into section 216 actions. *Church,* 137 F.R.D. at 306.

The Court finds that the more appropriate conclusion is that the Rule 23's factors (commonality, typicality, numerosity, and adequacy) are relevant to the Court's analysis of whether the putative plaintiffs are similarly situated, but that the *Sperling* "was [not] intended to invoke, verbatim, the procedures of Rule 23 into all ADEA action [sic] brought under section 216(b)."

Church, 137 F.R.D. at 306. Thus, when conducting an analysis of whether the putative plaintiffs are similarly situated, the Court will consult Rule 23's factors but not be bound by them.

Rule 23 allows a class action only if joinder is impracticable, there are questions common to the class, the claims of the representative is typical of the class, and the representative will adequately represent the class. The parties seem to agree that the commonality and typicality factors are present in the case at bar. The parties disagree, however, as to whether the impracticability and adequacy of representation factors justify certification of the class.

Under Rule 23, the burden is on the plaintiff to show that joinder is impracticable. *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 55 (8th Cir. 1977). The decision on whether joinder is impracticable is within the Court's discretion and in making that determination the Court should consider all the circumstances surrounding the case. *Id.* In this case, plaintiff seeks to bring only thirteen additional people into this lawsuit. While it is widely recognized that the mere number in a class in not controlling on the issue of impracticability of joinder, it is the most important factor. *Independent School Dist. No. 89 v. Bolain Equipment, Inc.*, 90 F.R.D. 245, 247 (W.D.Okla. 1980). The Court believes that the joinder of thirteen identified persons is not impracticable. *See e.g., Ewh v. Monarch Wine Co., Inc.*, 73 F.R.D. 131 (E.D.N.Y. 1977) (joinder of thirty-four to fifty not impracticable); *Stoner v. Ford*, 390 F.Supp. 327 (N.D.Okla. 1974) (joinder of twenty-nine not impracticable). The relatively small size of the class supports a conclusion that joinder is the more appropriate procedural tool. Before reaching this conclusion, however, the Court had to consider a possible obstacle that might render joinder impracticable. The Court was concerned that while piggy-

backing untimely claims to timely claims is allowed in class actions, it might not be allowed if the Court only joined the claims and parties. Accordingly, the Court requested that the parties submit additional briefs on this issue. "Every court of appeals that has addressed the issue has held . . . that plaintiffs who have not timely filed a charge can rely on the timely charge of another plaintiff in a class action *or* in a multiple plaintiff joint action." *Anderson v. Montgomery Ward & Co. Inc.*, 852 F.2d 1008, 1017-18 (7th Cir. 1988) (emphasis in original) (citations omitted). The Eighth Circuit has addressed this issue in the Title VII context in *Allen v. Amalhamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977). In *Allen*, thirteen black union members filed suit against the union alleging racial discrimination. The thirteen filed a single suit, but did not seek class certification. The district court denied Title VII relief to all plaintiffs but two because only those two had filed charges with the EEOC and the complaint did not allege a class action or seek class relief. The Eighth Circuit found the district court had erred:

> It is settled that a suit by a named member of a class in a class action may seek relief for the entire class without the necessity of other class members pursuing their administrative remedy with the EEOC. In the instant case, although no class action was filed, 13 additional plaintiffs alleged facts demonstrating they were similarly situated and had received the same discriminatory treatment as [the two plaintiffs that filed charges with the EEOC]. Under such circumstances, particularly where the discrimination is continuing it would be nonsensical to require each of the plaintiffs to

individually file administrative charges with the EEOC.

Id. at 882-83 (citations omitted). *See also Snell v. Suffolk County*, 782 F.2d 1094, 1100-02 (2d Cir. 1986) (adopting single filing rule); *Jackson Seaboard Coast Line R. Co.*, 678 F.2d 992, 1011 (11th Cir. 1982) ("[I]n a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, the co-plaintiff with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement.") (quoting *Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir. 1982)); *Foster v. Gueory*, 655 F.2d 1319, 1322-23 (D.C.Cir. 1981) (adopting single filing rule).

Finally, defendant's argument that plaintiff is not an adequate representative of the class is unpersuasive. The Court has carefully reviewed the facts and the law and concludes that plaintiff is an adequate representative of the class.

In short, the Court concludes that plaintiff has satisfied section 216's requirement that all putative plaintiffs be similarly situated. Nevertheless, while Rule 23 does not strictly apply, reference to Rule 23's impracticability of joinder requirement is relevant and appropriate. Given the fact that plaintiff seeks to join thirteen specific persons, all but one of whom was laid off in 1990 from the Software Engineering Division, plaintiff has not established that certification of the class is necessary to vindicate the rights of individual class members, *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), or will serve the interests of judicial economy. *Buford v. American Finance Co.*, 333 F.Supp. 1243 (D.Ga. 1971). The Court concludes that the more

appropriate resolution is to deny the motion for class certification but to allow the putative plaintiffs to join this action.[7]

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. plaintiff's motion for class certification is denied; and

2. putative plaintiffs are authorized to join this action as individually-named parties.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: March 25, 1993

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7. Because the Court will not certify the class, the Court need not address the issue of what type of notice to the class would be appropriate. *See Hoffmann-La Roche Inc. v. Sperling*, 110 S.Ct. 482, 486 (1989).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA FOURTH DIVISION FILED DECEMBER 1, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-92-138

Richard Anderson and Norris Nielsen,

Plaintiffs,

v.

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys d/b/a Paramax Systems,

Defendant.

ORDER

Douglas P. Kempf, Kempf & Kempf, 7801 East Bush Lake Road, Suite 260, Bloomington, MN 55439-3112, for plaintiffs.

Thomas M. Sipkins, Joseph G. Schmitt, Popham, Haik, Schnobrich, & Kaufman, Ltd., 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on defendant's motion for summary judgment. The Court finds that there are material factual disputes which preclude summary judgment in this case.

Appendix C

Accordingly, based on all of the files, records and proceedings, and for the reasons stated from the bench at oral argument,

IT IS ORDERED that defendant's motion for summary judgment is denied.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: December 1, 1993